REMARKS

Entry of the foregoing amendments is respectfully requested.

Summary of Amendments

Upon entry of the foregoing amendments, claims 42 and 43 are cancelled and claims 44 and 45 are added, whereby claims 18-41, 44 and 45 will be pending, with claims 18, 37 and 44 being independent claims.

Support for the new claims can be found throughout the present specification (see e.g., the Examples).

Applicants point out that the cancellation of claims 42 and 43 is without prejudice or disclaimer, and Applicants expressly reserve the right to prosecute the cancelled claims in one or more continuation and/or divisional applications.

Summary of Final Office Action

Claims 18-24, 28-31, 34, 36-39, 42 and 43 are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Bellon et al., FR 2,789,397 (hereafter "BELLON").

Claims 25-27, 32, 33, 40 and 41 are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over BELLON and further in view of Snyder, U.S. Patent No. 4,708,813 (hereafter "SNYDER").

Claim 35 is rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over BELLON in view of Saint-Leger et al., U.S. Patent No. 5,939,077 (hereafter "SAINT-LEGER").

Claims 18-22, 28-33, 35, 42 and 43 are rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Beutler et al., U.S. Patent No. 4,404,388 (hereafter "BEUTLER").

Claim 42 is rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Penska et al., EP 0 938 890 (hereafter "PENSKA").

Claim 42 is rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Marilyn et al., WO 92/16188 (hereafter "MARILYN").

Claims 18-41 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as allegedly being unpatentable over claims 15-34 and 43 of Application No. 10/469,695; claims 16-31, 34, 35, 45, 47 and 48 of Application No. 10/469,696; claims 17-32, 35, 36, 47 and 48 of Application No. 10/469,697; claims 14-29, 32, 33, 42 and 43 of Application No. 10/469,698; and claims 13-28, 31, 32 and 40 of Application No. 10/469,074.

Claim 42 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as allegedly being unpatentable over claims 15-17 of Application No. 10/760,088.

Response to Office Action

Reconsideration and withdrawal of the rejections of record are respectfully requested in view of the foregoing amendments and the following remarks.

Response to Rejection of Claims under 35 U.S.C. § 103(a) over BELLON

Claims 18-24, 28-31, 34, 36-39, 42 and 43 are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over BELLON. The rejection relies mainly on Example 1 of BELLON and alleges that this example discloses a facial foam composition which comprises 22 % by weight of

PEG-100 stearate glyceryl stearate (allegedly corresponding to emulsifier B according to the present claims), 12 % by weight of stearic acid (corresponding to emulsifier A according to the present claims) and 6 % by weight of octyldodecanol (corresponding to co-emulsifier C according to the present claims) as well as 70 % by volume of nitrogen. The rejection concedes that BELLON does not exemplify a preparation wherein the total amount of emulsifiers A, B and C is from 2 to 20 % by weight of the preparation but essentially alleges that it would have been obvious for one of ordinary skill in the art to provide a corresponding preparation.

The Examiner relies on an English language translation of BELLON prepared by the Patent and Trademark Office, which translation will be referred to in the following.

Applicants respectfully traverse this rejection. Initially, it is noted that claims 42 and 43 are cancelled, wherefore with respect to these claims the rejection is moot.

It further is noted that the Examiner takes the position that "PEG-100 stearate glyceryl stearate" used in Example 1 of BELLON is a polyethoxylated fatty ester which falls within the definition of emulsifier B recited in the present independent claims. In this regard, Applicants point out that the substance used in Example 1 of BELLON is not merely PEG-100 stearate, but PEG-100 stearate glyceryl stearate, the specific structure of which is unknown to Applicants. The Examiner has not provided any explanation and/or evidence as to what the structure of this substance is, either. That this substance is a special, not readily available substance is indicated by the fact that in Example 1 of BELLON it is stated that the substance is marketed by the company SEPPIC (see Table at page 11 of BELLON). This would apparently be unnecessary if PEG-100 stearate glyceryl stearate were readily available from a number of commercial sources (as this is would be the case with PEG-100 stearate).

Even if one were to assume, for the sake of argument, that "PEG-100 stearate glyceryl stearate" is an emulsifier B as recited in the present claims, the fact remains that the total concentration of emulsifiers A to C according to Example 1 of BELLON is 22 % + 12 % + 6 % = 40 %. Even if it is taken into account that the total concentrations indicated in Example 1 of BELLON add up to a little over 120 %, the total concentration of emulsifiers A to C, normalized to 100 %, would still be about 33 %, i.e., more than one and a half times the total concentration of 20 % by weight recited in present independent claims 18 and 42, and more than twice the total concentration of 15 % by weight recited in present independent claim 37.

Applicants note that according to page 6, last paragraph of the Final Office Action of February 23, 2007 the argument that the composition of Example 1 of BELLON contains far more than 20 % by weight of (alleged) emulsifiers A to C has not been found persuasive "because the percentage weights Applicants is relying upon is not the composition as a whole, but the composition without nitrogen".

In this regard, Applicants point out that nitrogen is a gas and as such cannot reasonably be assumed to significantly change the relative concentrations of the non-gaseous components of the composition of Example 1 of BELLON. It further is noted that the composition of Example 1 contains 70 % by volume of nitrogen, i.e., a negligible amount in terms of weight.

The Examiner further appears to take the position that it would have been obvious to one of ordinary skill in the art to change (reduce) the total concentration of the alleged emulsifiers A, B and C of Example 1 of BELLON to make it fall within the claimed range of from 2 % to 20 % by weight, i.e., to use not more than about 60 % of the total amount of the alleged emulsifiers A to C. However, there is no apparent reason whatsoever for changing (reducing) the total amount of the alleged

emulsifiers A to C in Example 1 of BELLON, let alone to reduce this amount by at least about 40 %.

Applicants point out that a particular parameter (here: the total amount of emulsifiers A, B and C) must first be recognized as result-effective variable, i.e., a variable which achieves a recognized result, before the determination of the optimum or workable ranges of said variable might be recognized as routine experimentation. *In re Antonie*, 559 F.2d 617, 195 USPQ 6 (CCPA 1977).

Applicants further point out that BELLON does not even discuss the compounds which allegedly correspond to the present emulsifiers A, B and C in combination, let alone as an emulsifier system, but mentions them separately and for different purposes, if at all.

Specifically, the stearic acid of Example 1 of BELLON is discussed as a possible constituent of the lipophilic phase and the "soap" of the composition of BELLON (see, e.g., page 4, second paragraph and page 5, last paragraph of the English language translation of BELLON).

Fatty bodies which include "esters of oxyethylenated (or not) fatty acids" of BELLON (which may or may not encompass the "PEG-100 stearate glyceryl stearate" of Example 1), vegetable, mineral or synthetic oils, non-volatile and volatile silicone oils... are mentioned, among many others, as (optional) traditional cosmetic adjuvants of the composition (see, e.g., page 8, second paragraph of the English language translation of BELLON), i.e., are not even identified as emulsifiers (but instead as "fatty bodies") and also are not indicated to be associated with any advantage which would make their incorporation in a composition of BELLON particularly desirable.

The intended function of the third component of interest of Example 1 of BELLON, i.e., octyldodecanol, is not identified in BELLON at all. The fact that BELLON does not even mention the function of, let alone any advantage associated with, the presence of octyldodecanol clearly fails

to provide any reason for optimizing the concentration of octyldodecanol in the composition of Example 1 of BELLON. Further, even if one were to assume, *arguendo*, that there is a reason for one of ordinary skill in the art to optimize the concentration of octyldodecanol, it is not seen that there is a reason for optimizing the total concentration of octyldodecanol, stearic acid and PEG-100 stearate glyceryl stearate. BELLON clearly lacks an indication that these three components together may give rise to any (advantageous) effect.

In other words, the question is not whether one of ordinary skill in the art could have optimized (reduced) the total concentration of the three components of interest in Example 1 of BELLON, but for which reason he or she would have done so. The present rejection does not explain where a corresponding reason is supposed to come from.

Applicants submit that at least for all of the foregoing reasons and the additional reasons set forth in the responses to the previous Office Actions, BELLON fails to render obvious the subject matter of any of the claims submitted herewith. Accordingly, withdrawal of the rejection under 35 U.S.C. § 103(a) over BELLON is again respectfully requested.

Response to Rejection of Claims under 35 U.S.C. § 103(a) over BELLON in View of SNYDER or SAINT-LEGER

Dependent claims 25-27, 32, 33, 35, 40 and 41 are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over BELLON in view of SNYDER or in view of SAINT-LEGER. The rejection concedes that BELLON fails to teach the presence of hydrophilic emulsifier and of particular alcohols such as cetyl alcohol and stearyl alcohol in the compositions disclosed therein. In this regard, the rejection relies on SNYDER which allegedly teaches a nonlathering cleansing mousse with skin condition benefits which may contain sorbitan monostearate as a surfactant and

fatty alcohol foam modifiers such as cetyl alcohol and stearyl alcohol. The rejection further concedes that BELLON fails to disclose carbon dioxide as the gas in the compositions disclosed therein but alleges that SAINT-LEGER teaches carbon dioxide and nitrogen as interchangeable gases.

These rejections are respectfully traversed as well. Claims 25-27, 32, 33, 35, 40 and 41 all ultimately depend from independent claims 18 or 37, respectively. As set forth above, independent claims 18 and 37 are not rendered obvious by BELLON for several reasons. It is noted that the Examiner does not allege that SNYDER remedies any of the deficiencies of BELLON discussed above. Accordingly, the subject matter of claims 25-27, 32, 33, 40 and 41 is not rendered unpatentable by BELLON in view of SNYDER for at least all of the reasons which are set forth above with respect to, *inter alia*, independent claims 18 and 37.

Applicants further point out that there are additional reasons why BELLON in view of SNYDER does not render obvious the subject matter of claims 25-27, 32, 33, 40 and 41. Specifically, BELLON is directed to compositions in the form of a foam (see, e.g., claims of BELLON). In contrast, SNYDER is directed to non-lathering compositions (see, e.g., title of SNYDER).

For example, in the first paragraph at page 10 of the English language translation of BELLON it is emphasized that "[t]he characteristic texture of the compositions according to the invention facilitates the formation of foam and thus allows one to use these composition [sic] as a hygiene product, such as those intended for cleaning the skin, to remove make-up from the face or shaving products."

SNYDER on the other hand, states in column 2, lines 50-68 (emphases added):

> The invention relates to a skin cleansing mousse, packaged in a pressurized aerosol dispenser, which provides superior skin conditioning benefits. The composition is nonlathering, and therefore does not require rinsing from the skin after application. The no-rinse feature results in maximum retention on the skin of the skin conditioning ingredients present in the mousse composition. The mousse has a rich creamy texture when dispensed from the aerosol dispenser. After application to the skin, any excess is easily wiped off (e.g., with a tissue or cloth), leaving a substantial residue of skin conditioning ingredients (moisturizers and emollients) on the skin. This is in contrast to high lathering mousse compositions which require rinsing. In the act of rinsing, substantial proportions of the skin conditioning ingredients which have been applied to the skin with the mousse are taken up into the rinse water and are thus wasted.

Applicants submit that in view of the substantial difference in the objectives of BELLON and SNYDER reflected by the above-recited passages of these documents there is no motivation for one of ordinary skill in the art to look in SNYDER for further emulsifiers (or other components) which can be added to the compositions of BELLON.

Moreover, an essential component of the compositions of BELLON is a fatty acid (see, e.g., claim 2 and page 5, last paragraph of BELLON). SNYDER on the other hand, does not even appear to mention fatty acids.

For at least all of the above additional reasons, BELLON in view SNYDER in unable to render obvious the subject matter of any of the rejected claims.

Applicants note that at page 7, last paragraph of the Final Office Action of February 23, 2007 it is mentioned that in SNYDER [s]orbitan monostearate is taught as a surfactant that provides skin cleansing benefits and imparts a uniform dispersion of emollient and other ingredients in the composition". This statement was probably made in view of claims 26 and 41 which recite mono-, di- and tri-fatty acid esters of sorbitol as hydrophilic emulsifiers. However, sorbitan and sorbitol are apparently not the same. This is yet another reason why BELLON in view of SNYDER fails to

render obvious claims 26 and 41.

For at least the reasons set forth above, withdrawal of the rejection under 35 U.S.C. § 103(a) over BELLON, either alone or in view of SNYDER or SAINT-LEGER, is respectfully requested.

Response to Rejection of Claims under 35 U.S.C. § 102(b) over BEUTLER

Claims 18-22, 28-33, 35, 42 and 43 are rejected under 35 U.S.C. § 102(b) as allegedly being anticipated BEUTLER. The rejection appears to rely on Example 7/2 of BEUTLER. From the comments at page 10 of the Final Office Action of February 23, 2007 it further appears that the Examiner concedes that the composition of Example 7/2 does not contain an emulsifier B as recited in the present claims. In this regard, the Examiner seems to rely on Example 4/2 of BEUTLER which comprises PEG-9 stearate as non-ionic emulsifier.

Applicants respectfully traverse this rejection as well. Initially, it is noted that claims 42 and 43 are cancelled, wherefore with respect to these claims the rejection is moot.

Applicants further point out that the Examiner has failed to point to a single specific composition of BEUTLER which can be considered to be encompassed by any of the rejected claims. In this regard, Applicants specifically direct the Examiner's attention to NetMoneyIN, Inc. v. VeriSign, Inc., 545 F.3d 1359 (Fed. Cir. 2008). Relevant portions of this decision are reproduced below for the Examiner's convenience (emphasis in original):

> The district court, after finding all five of these links in the iKP reference, albeit in two separate disclosed examples, concluded that claim 23 was anticipated under 35 U.S.C. § 102(a) and therefore invalid. Specifically, the district court concluded:
>
> > All of the limitations of claim 23 can be found within the iKP reference. A simple combination would produce the system described in claim 23 of the '737 patent. That no

specific example within iKP contains all five links does not preclude a finding of anticipation.

Summary Judgment Decision at 3. NMI contends that the district court's combination of two disclosed examples in order to find all elements of the claim was erroneous. VeriSign responds that the district court did not improperly rearrange the links in the iKP reference, but rather "merely relied on various express teachings from a single document that together completely disclose the five claimed links." Appellees' Br. at 61. Under VeriSign's theory, this was sufficient to establish anticipation, because all that is required is "that the four corners of a single, prior art document describe every element of the claimed invention." Id. at 61-62 (quoting Xerox Corp. v. 3Com Corp., 458 F.3d 1310, 1322 (Fed. Cir. 2006)). We disagree with VeriSign, and take this opportunity to clarify what a reference must show in order to anticipate a claimed invention.

Section 102(a) provides that an issued patent is invalid if "the invention [therein] was . . . described in a printed publication . . . before the invention thereof by the applicant." Section 102 embodies the concept of novelty—if a device or process has been previously invented (and disclosed to the public), then it is not new, and therefore the claimed invention is "anticipated" by the prior invention. As we have stated numerous times (language on which VeriSign relies), in order to demonstrate anticipation, the proponent must show "that the four corners of a single, prior art document describe every element of the claimed invention." Xerox, 458 F.3d at 1322 (quoting Advanced Display Sys., Inc. v. Kent State Univ., 212 F.3d 1272, 1282 (Fed. Cir. 2000)). This statement embodies the requirement in section 102 that the anticipating invention be "described in a printed publication," and is, of course, unimpeachable. But it does not tell the whole story. Because the hallmark of anticipation is prior invention, the prior art reference—in order to anticipate under 35 U.S.C. § 102—must not only disclose all elements of the claim within the four corners of the document, but must also disclose those elements "arranged as in the claim." Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1548 (Fed. Cir. 1983).

The meaning of the expression "arranged as in the claim" is readily understood in relation to claims drawn to things such as ingredients mixed in some claimed order. In such instances, a reference that discloses all of the claimed ingredients, but not in the order claimed, would not anticipate, because the reference would be missing any disclosure of the limitations of the claimed invention "arranged as in the claim." But the "arranged as in the claim" requirement is not limited to such a narrow set of "order of limitations" claims. Rather, our precedent informs that the "arranged as in the claim" requirement applies to all claims and refers to the need for an anticipatory reference to show all of the limitations of the claims arranged or combined in the same way as recited in the claims, not merely in a particular order. The test is thus more accurately understood to mean "arranged or combined in the same way as in the claim."

For example, in Lindemann Maschinenfabrik GmbH v. American Hoist & Derrick Co., 730 F.2d 1452 (Fed. Cir. 1984), we reviewed a district court's determination that a patent directed to a hydraulic scrap shearing machine was anticipated by a prior patent directed to a method for shearing spent nuclear fuel bundles. Because the district court had "treated the claims as mere catalogs of separate parts, in disregard of the part-to-part relationships set forth in the claims and that give the claims their meaning," we reversed. Id. at 1459. Although the

prior art reference could be said to contain all of the elements of the claimed invention, it did not anticipate under 35 U.S.C. § 102 because it "disclose[d] an entirely different device, composed of parts distinct from those of the claimed invention, and operating in a different way to process different material differently." Id. at 1458. The reference thus was deficient because it did not disclose the elements of the claimed invention "arranged as in the claim" as required by 35 U.S.C. § 102. Id.

In Ecolochem, Inc. v. Southern California Edison Co., 227 F.3d 1361 (Fed. Cir. 2000), we reviewed a district court's decision that a prior art reference directed to "Saving Energy by Catalytic Reduction of Oxygen in Feedwater" anticipated a claim reciting the use of hydrazine with a mixed resin bed to deoxygenate water. In finding that the reference anticipated the claim, the district court considered a figure and accompanying text, which taught the use of hydrogen with a mixed bed to deoxygenate water, in conjunction with a separate passage discussing deoxygenating water with, among other things, hydrazine. Id. at 1369. We reversed. After determining that the relevant figure and accompanying text described only the use of hydrogen to deoxygenate water, we concluded that the reference could not anticipate the claimed invention because there was no link between that figure and the general discussion of hydrazine as a deoxygenating agent. Id. In other words, we concluded that although the reference taught all elements of the claim, it did not contain a discussion suggesting or linking hydrazine with the mixed bed in the figure, and thus did not show the invention arranged as in the claim.

***

In all of these cases, the prior art reference had to show the claimed invention arranged or combined in the same way as recited in the claim in order to anticipate. We thus hold that unless a reference discloses within the four corners of the document not only all of the limitations claimed but also all of the limitations arranged or combined in the same way as recited in the claim, it cannot be said to prove prior invention of the thing claimed and, thus, cannot anticipate under 35 U.S.C. § 102.

Here, the iKP reference discloses two separate protocols for processing an Internet credit card transaction. Neither of these protocols contains all five links arranged or combined in the same way as claimed in the '737 patent. Thus, although the iKP reference might anticipate a claim directed to either of the two protocols disclosed, it cannot anticipate the system of claim 23. The district court was wrong to conclude otherwise.

Applicants submit that even if one were to assume, *arguendo*, that Examples 7/2 and 4/2 of BEUTLER disclose all of the elements which are recited in the rejected claims, they would clearly not disclose these elements as arranged in these claims. For this reason alone, the present rejection is apparently without merit.

Applicants additionally submit that the composition of Example 7/2 of BEUTLER mainly relied on by the Examiner comprises, *inter alia*, 2.5 % by weight of stearic acid (which corresponds to emulsifier A recited in present independent claim 18) as one component of the consistency providing agents contained therein and 1.0 % by weight of cetearyl alcohol (which corresponds to emulsifier C recited in present independent claim 18) as the other component of the consistency providing agents. The composition of Example 7/2 of BEUTLER clearly does not contain any emulsifier B as recited in the present claims, i.e., a polyethoxylated fatty acid ester having a chain length of from 10 to 40 carbon atoms and a degree of ethoxylation of from 5 to 100 and/or an ester of a fatty acid having a chain length of from 10 to 40 carbon atoms and polyethylene glycol comprising from 5 to 100 ethylene glycol units.

The composition of Example 4/2 of BEUTLER on the other hand comprises 1.5 % by weight of cetyl alcohol (which corresponds to emulsifier C recited in present independent claims 18 and 42) as the only consistency-providing agent and 6.0 % by weight of PEG-9 stearate (which corresponds to emulsifier B recited in present independent claims 18 and 42) as the only non-ionic emulsifier. The composition of Example 4/2 clearly does not comprise a compound which would qualify as emulsifier A as recited in the present claims, i.e., a wholly or partially neutralized or unneutralized, branched or unbranched, saturated or unsaturated fatty acid having a chain length of from 10 to 40 carbon atoms.

Moreover, the compositions of Examples 4/2 and 7/2 of BEUTLER differ significantly in a number of other aspects (components) as well. For example, the oil component of the composition of Example 4/2 consists of 24 % by weight of a single substance, i.e., isopropyl myristate, whereas the oil component of the composition of Example 7/2 consists of three substances, i.e., (a) 4.0 % by

weight of mineral oil, (b) 3.0 % by weight of isopropyl palmitate and (c) 3.0 % by weight of octyldodecanol.

Accordingly, not only are the oil components of the compositions of Examples 7/2 and 4/2 completely different from each other, but the percentage of oil component in the composition of Example 7/2 also is less than half the percentage of the oil component of the composition of Example 4/2.

Additionally, the components of the composition of Example 4/2 which are different from water account for 31.5 % by weight, compared to 15.5 % by weight, in the case of the composition of Example 7/2.

Even further, in addition to the substantial differences set forth above, the compositions of Examples 4/2 and 7/2 differ not only with respect to the amounts and types of consistency-providing agent(s) but also with respect to the amount and type of non-ionic emulsifier employed therein. At any rate, in view of the number of substantial differences in the compositions of Examples 4/2 and 7/2 of BEUTLER, one of ordinary skill in the art will not assume that the non-ionic emulsifier used in Example 7/2 of BEUTLER, i.e., (2 % by weight of) ceteareth-12 and the non-ionic emulsifier employed in Example 4/2 of BEUTLER, i.e., (6 % by weight of) PEG-9 stearate are interchangeable, the more so since ceteareth-12 and PEG-9 stearate are not only different compounds (and employed in different amounts) but even belong to different classes of compounds.

It further is pointed out that independent claim 18 recites that the preparation recited therein comprises a total of from 2 % to 20 % by weight of emulsifiers A to C. Even if one were to assume, *arguendo*, that a combination of Examples 7/2 and 4/2 of BEUTLER is able to anticipate a preparation which comprises emulsifers A to C, it is not seen that BEUTLER contains any

disclosure which in combination with Example 7/2 thereof predominantly relied on by the Examiner necessarily results in a total concentration of emulsifiers A to C of from 2 % to 20 % by weight, and neither has the Examiner offered any explanation in this regard.

Specifically, while Example 4/2 of BEUTLER comprises PEG-9 stearate, i.e., a compound which qualifies as emulsifier B as recited in the present claims, it is pointed out that the composition of Example 4/2 does not appear to comprise a compound which qualifies as emulsifier A according to the present claims (i.e., a fatty acid). Moreover, the compositions of Examples 4/2 and 7/2 of BEUTLER differ significantly in a number of other aspects (components), wherefore one of ordinary skill in the art will not assume that the non-ionic emulsifier of Example 7/2 of BEUTLER (2 % by weight of ceteareth-12) is freely interchangeable with the non-ionic emulsifier employed in Example 4/2 of BEUTLER (6 % by weight of PEG-9 stearate).

Applicants further note that there are additional reasons with respect to at least dependent claims 21, 22, 28 and 29 which make it even more apparent that the rejection of these claims under 35 U.S.C. § 102(b) over BEUTLER is without merit.

Specifically, claim 21 (which depends from claim 18) recites that the weight ratio of emulsifiers A : B : C in the preparation of claim 18 is a : b : c and a, b, c represent rational numbers of from 1 to 5. In other words, all three of the weight ratios A : B, A : C and B : C are not higher than 5 : 1 and not lower than 1 : 5.

Even if one were to assume, *arguendo*, that a combination of Examples 7/2 and 4/2 of BEUTLER is able to anticipate the preparation of claim 18, it is not seen that BEUTLER contains any disclosure which in combination with Example 7/2 thereof predominantly relied on by the

Examiner necessarily results in all weight ratios of emulsifiers A to C being not higher than 5 : 1 and not lower than 1 : 5, and neither has the Examiner offered any explanation in this regard.

Further, claim 22 (which depends from claim 21) recites that the weight ratio of emulsifiers A : B : C in the preparation of claim 18 is a : b : c and a, b, c represent rational numbers of from 1 to 3. In other words, all three of the weight ratios A : B, A : C and B : C are not higher than 3 : 1 and not lower than 1 : 3.

Even if one were to assume, *arguendo*, that a combination of Examples 7/2 and 4/2 of BEUTLER is able to anticipate the preparation of claim 18, it is not seen that BEUTLER contains any disclosure which in combination with Example 7/2 thereof predominantly relied on by the Examiner necessarily results in all weight ratios of emulsifiers A to C being not higher than 3 : 1 and not lower than 1 : 3, and neither has the Examiner offered any explanation in this regard.

Further, claim 28 recites that the preparation of claim 18 comprises a total of from 5 % to 15 % by weight of emulsifiers A to C.

Even if one were to assume, *arguendo*, that a combination of Examples 7/2 and 4/2 of BEUTLER is able to anticipate the preparation of claim 18, it is not seen that BEUTLER contains any disclosure which in combination with Example 7/2 thereof predominantly relied on by the Examiner necessarily results in a total concentration of emulsifiers A to C of from 5 % to 15 % by weight, and neither has the Examiner offered any explanation in this regard.

Further, claim 29 recites that the preparation of claim 18 comprises a total of from 8 % to 13 % by weight of emulsifiers A to C.

Even if one were to assume, *arguendo*, that a combination of Examples 7/2 and 4/2 of BEUTLER is able to anticipate the preparation of claim 18, it is not seen that BEUTLER contains any disclosure which in combination with Example 7/2 thereof predominantly relied on by the Examiner necessarily results in a total concentration of emulsifiers A to C of from 8 % to 13 % by weight, and neither has the Examiner offered any explanation in this regard.

Applicants submit that for at least all of the foregoing reasons (and for the additional reasons set forth in the responses to the previous Office Actions which are incorporated herein in their entirety) the rejection of claims 18-22, 28-33 and 35 under 35 U.S.C. § 102(b) over BEUTLER is apparently without merit, wherefore withdrawal thereof is respectfully requested.

Response to Rejections of Claim 42 under 35 U.S.C. § 102(b) over PENSKA and over MARILYN

Claim 42 is rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by PENSKA and as allegedly being anticipated by MARILYN.

Applicants note that claim 42 is cancelled, wherefore these rejections are moot.

Response to Provisional Rejections of Claims under Doctrine of Obviousness-Type Double Patenting

Claims 18-42 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as allegedly being unpatentable over several claims of Application Nos. 10/469,695; 10/469,696; 10/469,697; 10/469,698; 10/469,074 and 10/760,088.

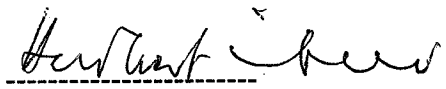
Applicants note that claim 42 is cancelled, wherefore the corresponding provisional rejection is moot. With respect to claims 18-41 Applicants again respectfully request that the corresponding

provisional rejections be held in abeyance until the Examiner has indicated allowable subject matter. Applicants will then decide whether it is necessary to file Terminal Disclaimers in the present application.

CONCLUSION

In view of the foregoing, it is believed that all of the claims in this application are in condition for allowance, which action is respectfully requested. If any issues yet remain which can be resolved by a telephone conference, the Examiner is respectfully invited to contact the undersigned at the telephone number below.

Respectfully submitted,
Heidi RIEDEL et al.



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